ADMINISTRATIVE LAW JUDGE'S RULING

Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC") has filed a Motion to Dismiss ("Motion") the instant arbitration Petition of XO Illinois, Inc. ("XO"). XO filed an Opposition to the Motion and Commission Staff filed a Response. Both XO and Staff urge denial of the Motion. SBC filed a Reply in support of the Motion.

In the Motion, SBC asserts that this Commission lacks jurisdiction to arbitrate XO's list of disputed issues under Section 252 of the federal Telecommunications Act of 1996 ("Act"). SBC's principal contention is that XO failed to make a threshold request for negotiation in the manner prescribed by Section 252. SBC avers, any request for negotiation by XO pertained to amending the existing SBC/XO interconnection agreement ("ICA") pursuant to the change of law ("COL") provision in that ICA. In SBC's view, only disputes arising from negotiations concerning a new or successor ICA are arbitrable under Section 252. Several issues arise from SBC's arguments.

What can be requested?

Under subsection 252(a)(1), an incumbent local exchange carrier ("ILEC") "may negotiate and enter into a binding agreement with the requesting [CLEC]" upon receiving a "request for interconnection, services or network elements pursuant to section 251." This suggests that the process begins with a CLEC's request for "things" (interconnection, services or elements). In contrast, subsection 252(b)(2) describes a "request for negotiation." SBC regards these requests as identical, however, Motion at 3, and subsection 252(b)(4)(C) confirms SBC's view by using the term "the request."

Accordingly, when the foregoing subsections are read together, they contemplate, in effect, a request for negotiations concerning provision, by the ILEC, of interconnection, services or elements. This reading is consistent with the conclusion of Coserv Limited Ltd. Cop. V. Southwestern Bell Tel. Co., 350 F.3d 482, 487 (5th Cir. 2003), cited by SBC[1], that "compulsory arbitration under [Section] 252 begins with a *request by a CLEC to negotiate with an ILEC regarding its obligations under [Section] 251*." (Emphasis added.) Thus, the range of appropriate subjects for a Section 252 negotiations request is broader than SBC posits – that is, it is not limited to new or successor interconnection agreements under subsection 251(c)(2), but to all of an ILEC's Section 251 obligations concerning services and network elements (e.g, under 251(c)(3)(4) & (6).

Who must make the request?

[1] Motion at 3.

SBC contends that the "requesting telecommunications carrier" under Section 252 cannot, perforce, be the ILEC. Motion at 4; SBC Reply at 5. SBC cites Coserv, *supra*, in support of this position. The text of Section 252 sustains SBC's point. Although either party can request arbitration under subsection 252(b)(1), only the party that is *not* the ILEC can request negotiation of the ILEC's Section 251 obligations.

A separate question, though, is whether the FCC, in the TRO, could and did authorize ILECs to request negotiations that can provide the predicate for compulsory arbitration under Section 252. The FCC stated: "[a]lthough section 252(a)(1) and 252(b)(1) refer to requests that are made *to* [ILECs], we find that in the interconnection amendment context, either the incumbent or the [CLEC] may make such a request." TRO, para. 703, fn. 2087 (emphasis in original). The FCC thus appears to have empowered SBC to request negotiations for the purpose of amending the SBC/XO ICA to incorporate changes necessitated by the TRO.

That does not complete the analysis on this issue, however. The FCC was specifically discussing those situations in which the governing ICA is "silent concerning change of law and/or transition timing." *Id*., para 703. The SBC/XO ICA does contain a provision addressing "intervening law." That provision states that disputes regarding material changes in applicable law "shall be resolved pursuant to the dispute resolution process provided for in this [ICA]." XO Opposition, Attach. 2. However, that dispute resolution process provides only that, after 30 days of discussion, either party "may seek any relief it is entitled to under Applicable law." *Id*., Attach. 1. The ICA dispute resolution process thus furnishes no mechanism *within the contract* for resolving disputes. Therefore, the ICA is "silent" within the meaning of paragraph 703 of the TRO, and the contents of footnote 2087 would be applicable to SBC here, if the FCC had the authority to make them so.

However, SBC offers two additional arguments intended to defeat application of footnote 2087 (and, indeed, the application of anything else in the TRO) to authorize SBC to request negotiations pursuant to Section 252. First, SBC maintains that the FCC was merely offering Section 252 as a dispute resolution "model" for ICA amendments necessitated by the TRO, rather than actually subjecting such disputes to Section 252 ("the FCC's repeated references to the timetable being *as if* the proceeding were governed by section 252(b) confirms that the FCC was not saying that the proceeding actually *is* governed by section 252(b)"). Motion at 8 (emphasis in original). Second, SBC contends that such authorization by the FCC would unlawfully "expand the jurisdiction that Congress conferred on state commissions in section 252(b)." *Id*., at 7. The interplay between these arguments is not entirely clear – that is, SBC does not definitively state that the FCC would be enlarging Congressional intent if it ordered state commissions to conduct "252-like" proceedings, as distinguished from actual 252 proceedings.

In any event, the FCC did direct ILECs and CLECs to proceed *under* Section 252 in the circumstances present here. When read together and properly integrated, paragraphs 700-706 of the TRO represent the FCC's preference for prompt and comparable processes when conforming existing ICAs to the TRO. The FCC understood that some existing ICAs would contain conflict resolution mechanisms that would accommodate resolution of TRO amendment disputes, while others would not. It therefore issued directives designed to produce reasonably comparable and prompt (i.e, 9- month) processes in either case.

Thus, ICAs that are silent with respect to resolution of such disputes would adhere to Section 252, TRO, para. 703, while ICAs with usable conflict resolution provisions would utilize their own processes, but subject to the 9-month timetable and good faith requirements of the Act. *Id*., para. 704. The FCC thereby confined certain carriers – those without a usable resolution mechanism in their ICA - to the procedures and time-frames of Section 252, while honoring those carriers that had produced an alternative conflict resolution provision in their ICAs, with the proviso that federal guidelines would be applied to prevent delay. Accordingly, when the FCC referred to a "default timetable" in paragraph 703 of the TRO, its intention was to identify the process that *must be used* in lieu of any other process that parties without existing dispute resolution provisions might prefer to adopt, not to create a new "252-like" process. Similarly, the reference to "good guidance" in paragraph 704 is to explain why the FCC chose to limit carriers with usable ICA dispute resolution procedures to a 9-month timetable.

Regarding Congressional intent, and the extent of the jurisdiction granted to the FCC and the state commissions, SBC argument is too broad, but ultimately correct on the point that matters here. SBC's argument is too broad insofar as it asserts that disputes concerning ICA amendments lie outside Section 252. Nothing in the Act says that. Indeed, the opposite is true. Congress included negotiations, disputes and agreements within the purview of Section 252, so long as they concern "interconnection, services or network elements pursuant to section 251." Accordingly, the FCC's scheme for resolving TRO-related amendment disputes merely implements Congressional intent. It simply makes no sense to assume that Congress subjected all other aspects of ICA formation and approval to the uniform, orderly and expeditious provisions of Section 252, yet left amendments of those agreements to haphazard resolution under unnamed processes[2].

[2] As for what resolution mechanism would apply here, SBC suggests Section 10-108 of the Illinois Public Utilities Act ("PUA"). Motion at 5, citing 220 ILCS 5/10-108. That statute authorizes complaints concerning "any act or things done or omitted to be done in violation of, or claimed to be in violation of, any provision of this Act, or any order or rule of the Commission." It is not clear that this Commission would have state jurisdiction to resolve a contract amendment dispute under that section; it is clear that some sort of violation of law or regulatory requirement would have to be alleged by the complaining party. Section 13-513 of the PUA, 220 ILCS 5/13-513, might offer a basis for jurisdiction, depending on the facts of the case. But the complainant would

It is one thing, however, to say that the Act makes ICA amendments subject to Section 252, and another thing to say that Congress authorized the FCC to permit an ILEC to request negotiations regarding such amendments. Congress has plainly determined that CLECs make negotiation requests and ILECs receive them. The FCC cannot undo that determination – unless the ICA amendment process lies outside of Section 252 and in some sort of alternative, "252-like" universe created solely by the FCC. But the FCC did not – and had no authority to - create that universe. The FCC can, of course, establish requirements in aid of its jurisdiction (and did so when it limited carriers with usable alternative conflict resolution mechanisms to a 9-month timetable), but such requirements cannot contravene explicit Congressional directives. Putting it colloquially, an administrative agency can add "subtext" as necessary to perform its authorized role, but cannot contradict the text of its authority. Accordingly, only XO could have established a predicate for arbitration here by requesting negotiations.

Did XO request negotiations?

On October 30, 2003, SBC sent correspondence to XO pertaining to SBC/XO ICAs in several states, including Illinois. Motion, Attach. 1. That correspondence is styled as a "Change in Law Notice," and it identifies two "change in law event[s] that impact[] the rates, terms and conditions of the [ICAs]" – the FCC's Triennial Review Order ("TRO")[3] and the decision in USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002). *Id*. SBC states in the correspondence that it "wishes to negotiate as a result of the TRO and USTA." *Id*. Although Section 252 of the Act is not mentioned in the correspondence, SBC does propose a "Negotiations Start date" and a date for commencement of "dispute resolution procedures" that correspond to the pre-arbitration processes in subsection 252(b)(1).

On November 26, 2003, XO replied to SBC's October 30 correspondence (and to a November 24, 2003 correspondence not offered for the record here). Motion, Attach. 2. In that reply, XO stated that, "[p]ursuant to the change of law provisions in the respective ICAs, XO is ready and willing to begin good faith negotiation of an amendment to implement certain changes in law brought about by the TRO." *Id*. XO requested that SBC quickly provide its "proposed TRO amendment," for which XO would furnish "substantive feedback to SBC

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bear the burden of proof, whereas the parties carry equal burdens under Section 252 of the Act. And more importantly, it is highly doubtful that Congress left ICA amendments to a patchwork of state remedies, assuming such remedies exist. Finally, it is ironic that SBC's antidote to the purported absence of state jurisdiction under Section 252 is state jurisdiction under 10-108 for amendments of federally mandated ICAs.

[3] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Service Offering Advanced Telecommunications Capability, FCC 03-36, CC Docket Nos. 01-338, 96-98 & 98-147, (rel. August 21, 2003).

regarding all of the issues raised, including but not limited to, whether the matters are properly the subject of these negotiations." *Id*. Regarding SBC's proposed "Negotiations Start date," XO averred that, per paragraph 704 of the TRO, negotiation of change of law amendments must proceed under subsection 252(b) of the Act. Accordingly, XO declared that "state arbitration" would be requested pursuant to the 252(b) schedule if negotiations did not produce agreements with respect to amendments of the SBC/XO ICAs.

In April 2004, employees of the parties exchanged emails concerning an extension of the time frame for negotiations. Petition, Ex. 1. In that electronic correspondence, XO personnel repeatedly referred to the "arbitration window" established by Section 252 and requested prompt action so that the window would not "close" before a timely arbitration request was made. *Id*. SBC personnel did not contradict or object to XO's explicit and implicit assertion that the parties' negotiations were proceeding under Section 252. On the other hand, SBC personnel never expressly mentioned Section 252 and described the parties' negotiations as "TRO discussions" regarding a "TRO amendment." *Id*.

What, then, did XO request, if anything, with respect to negotiations? The nature of XO's request can be gleaned from the totality of circumstances, events, averments and conduct of the parties, as reflected in the information supplied by the parties thus far. Since XO's first communication to SBC regarding negotiations was in response to an SBC correspondence, it is necessary to determine the contents and intentions of the latter in order to determine the contents and intentions of the former.

As already noted, SBC's correspondence states that two "change in law event[s]" had occurred, triggering the ICA's intervening law provision. That provision is not a dispute resolution mechanism. (Indeed, a change in law event may not cause a dispute.) Rather, the ICA's intervening law provision contemplates negotiation, and directs the parties to the ICA's "dispute resolution process" if negotiations under the intervening law provision do not produce agreement. The SBC correspondence further states that SBC is "enforcing its right to negotiate any and all conforming changes" to the parties' ICA necessitated by the TRO and WSTA. Motion, Attach. 1. SBC does not expressly state whether that "right" emanates from the ICA's intervening law provision or its dispute resolution provision, each of which contemplate negotiation. In either case, the parties end up in the same place, because the intervening law provision leads to the dispute resolution provision, which contains no provision for adjudicating disputes and simply allows the parties to pursue remedies under "applicable law" if additional negotiations are unavailing. In the SBC correspondence, the "applicable law" is apparently Section 252 of the Act, since SBC describes the arbitration timetable prescribed by subsection 252(b)(1).

Thus, the fair reading of SBC's correspondence is that, after the occurrence of what SBC perceived to be a change of law event, SBC requested

negotiation as a prelude to seeking arbitration under Section 252 (unless "otherwise agreed by the Parties"). There was no other resolution mechanism contemplated in the ICA, and the timetable described in SBC's letter has no relationship to any remedy under the PUA.

XO's reply letter acknowledges receipt of SBC's letter and similarly refers to the ICA's intervening law provision and to events triggering that provision ("certain changes in law brought about by the TRO"). With respect to dispute resolution, XO, as noted above, expressly discusses Section 252 – and does so in purported response to the use of the Section 252 arbitration timetable in SBC's letter. Consequently, the XO correspondence, when read in light of its purpose as a reply to the SBC letter, also regards the parties' future negotiation as a prelude to arbitration under Section 252. In the subsequent email exchange between the parties, XO reiterates that position (and SBC never disagrees).

In view of all the foregoing circumstances, XO's correspondence constituted a request for negotiations within the meaning of Section 252. That section prescribes no particular form for requesting negotiations, nor does it say that a negotiation request must expressly mention arbitration or the Act. It is sufficient that XO declared its intention to negotiate regarding the TRO's impact on interconnection, services and elements (which, in the context of SBC's letter, clearly apprised SBC of XO's intentions), and requested that SBC identify its substantive demands "*as soon as possible*." Motion, Attach. 2 (emphasis in original).

Although SBC sent the first correspondence, that did not preclude XO from making a request of its own. Rather, it meant that the negotiations start date would be determined by XO, as the only party that could request negotiations under the Act anyway[4]. Furthermore, it would be a perverse interpretation of the Act to allow an ILEC (which cannot request negotiations) to freeze out the CLEC (that can make such a request) by the simple expedient of sending the first negotiation letter.

What did XO request be negotiated?

XO's request mirrored the SBC request to which it responded. Each party clearly declared that the subject of negotiations would be the impact of a specific intervening legal event, the TRO[5]. Thus, XO requested prompt transmittal of SBC's proposed "TRO Amendment." Motion, Attach. 2. Moreover, XO cautioned SBC that XO would review that amendment to determine "whether the matters [it contained] are properly the subject of these negotiations." *Id*. XO's apparent

[4] In fact, the parties identify (by stipulation) their negotiations request date, for purposes of Section 252, as November 25, 2003, the day before the date of XO's correspondence.

[5] While SBC identified the WSTA decision as an additional intervening event, XO does not, referring solely to "certain changes in law brought by the TRO"). Motion, Attach. 2.

intention was to warn SBC that only changes associated with the TRO should be proposed in SBC's amendment.

Based on the determinations (above) that, under the Act, a CLEC may request negotiation of issues concerning an ILEC's provision of interconnection, services or elements, and that proposed amendments to existing ICAs that concern such issues can properly be the subject of Section 252 negotiation and arbitration, it follows that XO's negotiation request for TRO-related amendments was cognizable under Section 252.

Does XO request arbitration of its negotiation issues?

The preceding discussion and analysis do not shield XO from the instant dismissal motion, however. "The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations." Coserv, *supra*, at 487. The only subject of XO's negotiation request was the effect of the TRO on the SBC/XO ICA.

In the Petition, XO states:

> Although certain portions of the [TRO] arguably constitute a "change of law" necessitating good faith negotiations to amend the parties' [ICA], certain FCC requirements, for example, those related to routine network modifications to existing facilities (collectively, the "Pre-existing UNE obligations") are existing ILEC obligations – *predating the [TRO] – which do not require the parties to amend their existing interconnection agreement in order to effectuate them*. In other word, these obligations are pre-existing SBC obligations which the FCC has only further clarified in its [TRO]. *This clarification can in no way be considered a change of law that must be incorporated into an amendment before it becomes binding*.

Petition at 4-5 (emphasis added).

Since XO requested negotiations for the sole purpose of amending the parties ICA to incorporate changes necessitated by the TRO, it follows that XO cannot now obtain arbitration from this Commission for obligations that "predate" the TRO and "pre-existed" before its issuance. The Commission has no jurisdiction to arbitrate matters that lie outside the boundaries of XO's negotiation request. Coserv, *supra*.

The XO issues based on "pre-existing obligations" are not clearly delineated from those issues, if any, associated with the TRO. XO Issue 1 does concern the "routine network modifications" that XO cites (above) as an example of a "pre-existing" obligation. Issue 1 is therefore not arbitrable. Other XO Issues (3 and 6) are based, in part, on "ICC rules" which are not part of, and presumably predate, the TRO. Nonetheless, it may be that some or all of XO Issues 2-7 have sufficient connection the legal changes in the TRO to be within the ambit of XO's negotiation request. Accordingly, **at or before the close of business on June 8, 2004**, XO shall identify with specificity which of XO Issues 2-7 meet that test, and XO shall explain fully why that is so. SBC and Staff may reply to XO's declaration **on or before the close of business on June 11, 2004**. An additional Administrative Law Judge's ruling regarding dismissal of those issues will follow.

This is not to say the XO must go without a remedy for the wrongs it claims. Since XO alleges that "[n]otwithstanding SBC's preexisting UNE obligations, SBC has not complied with these obligations," Petition at 5, XO can bring an ICA enforcement action in an appropriate forum (and, perhaps, can assert prove anti-competitive conduct under the PUA). XO cannot, however, arbitrate claims concerning "pre-existing" obligations, which were not the subject of its negotiation request.

Summary

The instant Motion is granted with respect to XO Issue 1. Ruling on XO Issues 2-7 is deferred, pending additional filings by the parties. XO will file the matter described above on the timetable provided, and SBC and Staff may reply on that timetable.